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Certain Elements of the Transformed Hungarian Electoral System in the Light of the Experience of the 2014 Elections

I. Introduction

Three elections took place in Hungary in 2014, that is: the election of members of parliament in April, the election of members of the European Parliament in May, and local governmental elections in October. The ruling coalition Party elected in 2010 with a two-third majority fundamentally reformed our constitutional system. Amongst other reforms, the electoral system and the statutes of substantive and procedural laws of suffrage should be mentioned. These reforms triggered national and international controversies within the professional community. The Venice Commission's opinion and a number of other academic publications and forums sharply criticized these reforms. Notwithstanding the latter, academic arguments were voiced supporting the necessity for these justifiable reforms.

Within the framework of this paper, we obviously do not intend to extensively address the raised criticism. Our intention is only to provide the reader with a mere overview of the most criticized regulatory elements that reformed the Hungarian electoral system. We make references here, to the pro and con arguments which were voiced in the scope of Hungarian legal literature by legal institutions regarding some of these controversial elements. We will take into account the decisions already made on these issues and found in relevant case-law jurisprudence, including decisions taken by electoral organizations and higher appeal and Constitutional Court.

II. Modifications brought to the substantive electoral law of Hungary

1. Winner compensation

Enacted laws between 2011 and 2013 regulating the new electoral system were initially applied in the elections of 2014. While the mixed electoral system was upheld, the numbers of seats were decreased from 386 to 199; furthermore, the method of seat allocation was also modified. To decrease the number of political elites in Hungary was part of the academic publishing's intent as a response to society's expectations.[1]

Out of the 199 seats, only 106 were to be elected within single-member constituencies with a one-round majoritarian vote given to contending parties. The remaining 93 seats were to be allocated through a nationwide, proportional system mechanism, amongst the parties surpassing a five-percent threshold (or ten percent in case of joint party lists and fifteen percent to lists with more than two parties). Under the previous law, unused votes from the majoritarian contests were allocated to the proportional contest provided that the five-percent threshold was met. The new legislation maintains the use of the unused votes with provisions made to transfer the surplus votes of the winning candidates.

The manner, in which the reform of the electoral system was modified, is considered acceptable, even by the authors of critical legal literature, as it is within the European

[1] Az új magyar választási rendszer (The new Hungarian electoral system), Századvég Alapítvány. p. 8, http://szazadveg.hu/ld/w0w1i5r5l9k1k8j9f8i7_az-uj-magyar-valasztasi-rendszerSzazadveg-tanulmany130802.pdf, 20.1.2015.

constitutional traditions; more specifically, considering the fact that in many countries a purely majoritarian electoral system predominates.[2] The Hungarian legal literature forecasts party structure clustering, because a relative majority is now sufficient to win, as opposed to the former Hungarian parliamentary electoral system.[3]

Before 2014, in the first round of National Parliamentary Elections, absolute majority was required for a candidate to win in a single-member constituency. Critics admit that the partial modifications regulating the electoral system do not violate in themselves the principles of democracy. Sharp criticism, however, was voiced with regard to the reforms of the systematic partial rulings, more particularly in connection with the "winner compensation" section of the law. Even a report published by the Office for Democratic Institutions and Human Rights (OSCE) regarding the modification of the electoral system points out the following: "For these elections, this change resulted in six additional seats being allocated to Fidesz-KDNP."[4]

In the former electoral mechanism, only the fractional votes given of the defeated nominee were taken into account. Now however, the new electoral law provisions stipulate that fractional votes are to be allocated to the winning nominees as well. As a rule, each vote can only be counted once. Fractional votes are qualified as being the remaining votes of the candidate who received the second most votes increased by one vote, subtracted from the nominee's votes who won the mandate.

Criticism in legal literature is fundamentally based on the fact that "compensation" of the party of the winning nominee always favors (considering the relaxation of the conditions on the nomination of the candidates) the largest political power, and as such, does not necessarily serve the interests of the actual political party in power in the long run, regardless of what political side we are talking about.[5] Majority support can be strengthened by the evaluation of party ideology rather than basing it on professional grounds.[6] Critical legal literature is double fold. On the one hand, this said general practice is unknown to Europe and for that matter to the world, thus being a "Hungarian unique"[7], and on the other hand, this solution logically supposes that this compensation mechanism is designed to counterweigh inequalities which are bound to happen in favor of the majority.[8] Simultaneously, it results in the unjustified restrictions of equal voting power.[9]

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2 *G. Halmai*, A választójogi szabályozás átalakulása 2010–2013 (Transformation of the electoral law in Hungary between 2010–2013), MTA Law Working Papers no. 12|2014, p. 2, http://jog.tk.mta.hu/uploads/files/mtalwp/2014_12_Halmai.pdf, 20.1.2015.

3 Id., p. 2.

4 OSCE/ODIHR Limited Election Observation Mission Final Report – Hungary – Parliamentary Elections, 6 April 2014, Warsaw, 11 July 2014, p. 2, p. 7, http://www.osce.org/odihr/elections/hungary/121098?download=true, 20.1.2015.

5 *R. László*, A választójogi szabályozás átalakulása 2010–2014 (Transformation of the electoral law in Hungary between 2010–2014) in MTA Law Working Papers no. 21|2014, p. 5, http://jog.tk.mta.hu/uploads/files/mtalwp/2014_21_Laszlo.pdf, 20.1.2015.

6 Id., p. 6.

7 *László*, fn. 5, p. 6; *Halmai*, fn. 2, p. 3; *L. I. Kovács/P. B. Stumpf*, Egy unortodox megoldás: a parlamenti választás új kompenzációs szisztémája (An unorthodox solution: the new compensatory system of the Hungarian electoral system), in: *Zs. Fejes* (ed.): A magyar választási rendszer átalakulásának közjogi kihívásai (Public Law challenges of the transformation of the Hungarian electoral system), Pro Publico Bono – Magyar Közigazgatás, no. 4|2013, p. 69, p. 73, http://uninke.hu/uploads/media_items/pro-publico-bono-magyar-kozigazgatas-2013-4-1.original.pdf.

8 *László*, fn. 5, p. 6.

9 *Halmai*, fn. 2, p. 3.

Arguments in favor of reforming the electoral system concede that fractional vote calculations are favorable to winning parties.[10] This is considered justifiable by the governing authorities since they are the ones who put this electoral system in place. Moreover, this solution running in parallel with the national list system (as opposed to the former regional list system) leads to proportionality. These final calculations show that the internal ratio of the distributed parliamentary seats, according to the said list do not significantly change mandate distribution given that the results are close. In the event of walloping results, the amount of seats of the leading party increases further due to modifications in the calculation of the fractional votes.[11] Furthermore, generally speaking, a revision of the electoral substantive laws was considered to be justifiable, since they were the result of an over twenty-year old product of the former political parties' interests prior to the period of the political transition of 1989, when the electoral procedures of the members of parliament were carelessly regulated and merely created to benefit the interests of the political parties in power at the time.[12]

However, Hungarian statutory provisions on "winner compensation" do not necessarily result in additional mandates, more specifically not more than half of them. In electoral matters, existing solutions do not explicitly cater to the nominated organization which reaches a relative majority, (if such a thing exists) but rather to the organization of the winning individual candidate, which is not necessarily identical to the organization having relative majority leading to the final outcome of the elections. The efficient solution consists of giving only a significant number of fractional votes to the outcoming candidate (insofar as there is an organization behind the candidate and that this organization also established a list). If the difference between the first two candidates is slight in a given district, that is: the premium fractional votes are too few, then this fact does not result in an additional mandate.[13]

In addition to the above, from our standpoint it should be stipulated that the "winner compensation" is a historically established legal practice, which is known by Hungarian law, and is practiced worldwide as well.[14] This is known as the concept of "scorporo" and is used as a corrective mechanism in the electoral system, which first appeared in Italy within the framework of the electoral reforms of 1993.[15]

2. The inequality of expatriated voters residing abroad

The Constitution provides for the given cardinal act, to restrain suffrage or voting rights on the grounds of Hungarian residency.[16]According to critical views published in academic legal writings, the constitutional traditions common to the countries of Europe agree to the criteria (besides the condition of citizenship) that the voting right of citizens

[10] Az új magyar választási rendszer (The new Hungarian electoral system), fn. 1, p. 14.

[11] Id., p. 14.

[12] Id., p. 17.

[13] Constitutional Court Decision no. 3141/2014. (V. 9.) AB.

[14] Constitutional Court Decision no. 3141/2014. (V. 9.) AB.

[15] *Á. Cserny* (ed.), Választójogi kommentárok (Electoral law commentaries), Budapest 2014, p. 40.

[16] According to Article XXIII para. 4 of the Fundamental Law: "A cardinal Act may subject the right to vote or its completeness to residence in Hungary, and it may prescribe additional criteria for eligibility to stand as a candidate in elections."

should be directly attached to residency but not necessarily,[17] although the elected solution that makes a substantive difference in voting rights based on residency is quite unusual in this context as well.[18]

Although the Fundamental Law of Hungary de iure establishes the constitutionality of this divergence, de facto (substantively) these provisions can be considered restrictive of voting rights on a constitutional level, since inequality in votes cannot be constitutionally justified despite the Fundamental Law provisions.[19]

The reason why this solution is so problematic is because citizens living abroad will not be able to choose representatives in parliament since they can only contribute their votes to competing party lists.[20] Based on surveys' results, it can be presumed that the majority of those Hungarians living abroad who are interested in Hungarian politics will support right-wing parties for a reasonable length of time.[21] Calculations of the governing party were therefore justified with regard to the votes coming from abroad supporting them. Nevertheless, these votes from Hungarians living abroad did not affect the final result of the victorious party. Nonetheless, without these votes the outcome would not have provided the winning party with a two-third majority.

Thus, further concerns were exposed in relation to voting results of Hungarians living abroad having a negative effect on the opposition party in parliament. This, in itself creates a risk of animosity between Hungarians.[22] This situation can be considered problematic in a legitimate democracy, because these election results are in effect influenced by those who are not totally bearers of the consequences of their votes.[23] With the application of international practice, expatriates normally would only have the right to vote within a specific voting system, limiting their votes to a limited number of mandates.[24] The most significant criticism of this situation is based on the fact that the suffrage of Hungarians living abroad opposes the basic principles of equal suffrage since Hungarian expatriate voters can only cast one vote (for party lists), while Hungarian residents can cast two votes (one for the party lists and the other for an individual candidate).[25]

On the one hand, a proposal to solve this inequality would be to create so-called "virtual" election districts for Hungarians living abroad.[26] On the other hand, there could be discussions favoring a partial vote (i. e. one vote instead of two votes) as expatriate Hun-

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17 See: Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report. European Commission for Democracy through Law (Venice Commission) Venice, 18–19 October 2002, p. 5, p. 14–15.

18 *Z. Pozsár-Szentmiklósy*, Alapjogok az új választójogi szabályozásban (Fundamental rights in the new electoral law), in MTA Law Working Papers, no. 16|2014, p. 2, http://jog.tk.mta.hu/uploads/files/mtalwp/2014_16_Pozsar-Szentmiklosy.pdf, 20.1.2015.

19 Id., at 2.

20 *László*, fn. 5, p. 5.

21 *László*, fn. 5, p. 5.

22 *László*, fn. 5, p. 6.

23 *Halmai*, fn. 2, p. 2.

24 *L. Trócsányi*, A külföldön élő szavazati jogáról (About the suffrage of the expatriated voter) Pro Publico Bono – Magyar Közigazgatás, no. 4|2013, p. 84, p. 87–88, http://uni-nke.hu/uploads/media_items/pro-publico-bono-magyar-kozigazgatas-2013-4-1.original.pdf.

25 *A. Jakab*, A külföldön élő magyar állampolgárok választójoga egyenlőségének kérdése a választási törvény koncepciójában (The question of the equal suffrage rights of the expatriated Hungarian citizens in the light of the concept of the electoral law), in Pázmány Law Working Papers no. 38|2011.

26 *László*, fn. 5, p. 2–3, *Trócsányi*, fn. 24, p. 91; *Cs. Cservák*, Választási rendszerek – és az új magyar megoldás (Electoral systems – the new Hungarian solution), in: *Á. Rixer* (ed.): Állam és közösség: Válogatott közjogi tanulmányok Magyarország Alaptörvénye tiszteletére. Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar, Budapest 2012, p. 289–290.

garian citizens are less concerned with the internal affairs of Hungary.[27] However, this solution does not mean a shift in the requirements of equal suffrage in vote weight proportions.[28] The joint report of the Venice Commission and the Organization for Security and Co-operation in Europe did not in effect criticize this differentiation either.[29]

The report of the Venice Commission[30] basically has a positive approach to elections taking place abroad. Complying with its principles, it is of the opinion that citizenship includes suffrage rights, therefore, the right to exercise one's vote regardless of the place of residence of the citizen. Suffrage given to citizens living abroad ensures them of the possibility to participate in national politics even from abroad. One solution is that these citizens get special parliamentary representation (e. g. France, Italy, Portugal, Romania, and Croatia). The right to vote given to citizens living abroad warrants equality in citizenship. Suffrage promotes a citizenship statement of oneself as being part of a given nation, even though one lives away from his home land. Free movement of people and European mobility commands a guarantee of suffrage for citizens living abroad. The Venice Commission's opinion is that the new provisions of the law are considered to be good general practice, since its recommendations are in accordance with extending suffrage given to citizens living abroad. Thus, this leads to a direction (tendency) of universal suffrage. According to the Venice Commission, the fact that legislation limited the suffrage of Hungarians living abroad to the national list is justifiable due to the technical circumstances involved.[31]

The joint report of the Venice Commission and the Organization for Security and Co-operation in Europe, considers that the laws on suffrage given to non-resident Hungarian citizens, complies with the opinions formulated by them, and therefore hails these amendments.[32] However, it emphatically reminds the government to incorporate specific safeguarding measures into the procedural provisions of the laws on suffrage, explicitly ensuring the rights of voters.

The European Court of Human Rights in Strasbourg in a court case against Turkey, stated in a judgment, that Turkey did not violate human rights in the scope of free elections according to the provisions established in the European Convention on Human Rights, due to the fact that Turkish citizens living abroad for over six months could only partake in voting privileges for party lists and not for individual candidates.[33]

To summarize, it can be concluded that there is no uniform international best practice obligation deriving from international agreements regarding the provisions of suffrage of citizens living abroad.[34] Despite all these affirmations we consider that in the scope of the evaluation and revision of the provisions on electoral matters – concerning the moral problem of the distinction made between citizens – equal treatment should be given to

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27 *László*, fn. 5, p. 5.

28 *E. Bodnár*, Választójog és választási rendszer az Alaptörvényben (Electoral law and electoral system in the Fundamental Law), Magyar Közigazgatás no. 2011|3, p. 99–112, p. 108.

29 CDL-AD (2012)012 Avis conjoint relatif a la loi sur les elections des membres du Parlement de Hongrie.

30 CDL-AD (2011) 022. Rapport sur le vote á l'étranger.

31 Opinion No. 662/2012, CDL-AD(2012)012, Strasbourg, 18 June 2012.

32 CDL-AD(2012)012 Joint Opinion on the Act on the Elections of Members of Parliament of Hungary.

33 Oran v. Turkey (nos. 28881/07 and 37920/07), summary of the case (Engl.): http://hudoc.echr.coe.int/ sites/eng-press/pages/search.aspx?i=003-4734064-5752880#.

34 See a comparative analysis about voting from abroad: *A. Ellis/C. Navarro/I. Morales/M. Gratschew/N. Braun*, Voting from Abroad – The International IDEA Handbook. Federal Electoral Institute of Mexico, http://www.idea.int/publications/voting_from_abroad/, 20.1.2015.

non-resident expatriates by establishing virtual single-member constituencies on their behalf.

With regard to equal suffrage rights of citizens without residency in Hungary, there is another criticism which is procedural in nature. The new electoral procedural law allows only the citizens living abroad to cast their votes via post. Citizens with Hungarian residency but staying abroad on Election Day can only cast their votes at Hungarian embassies or consulates.

Once again critics see this as a violation of equal suffrage rights, and in a broad sense feel that it violates the principles that prohibit discrimination with respect to Hungarians with Hungarian residency.[35] This criticism is based on the fact that there is no significant difference between the two substantive groups regarding their access to vote. The fact that citizens with Hungarian residency voting abroad can also vote for individual candidates, does not justify the application of different electoral methods. However, opposing views in legal literature point out that there should be a distinction made between those who are staying abroad on Election Day (let it be for vacations or working purposes) and those citizens who are residing abroad and perhaps have never ever been Hungarian residents.[36]

In practice, critics see the problems of Hungarian voters with Hungarian residency, yet staying abroad, while possibly having to travel a long way to the polls on Election Day, having to bear travel expenses and having to stand in long queues in order to vote at embassies, while their compatriots with foreign residency can vote in a much easier fashion, that is: by returning a pre-requested voting package via postal services. As a solution to this problem, it has been suggested that the laws make it possible for that Hungarian residents staying abroad on Election Day, to also allow them to vote via postal services. However, even criticisms supporting discrimination bring up the possibility of abuse when voting via post, because of the difficulties of electronic registration and the supervision of votes.[37] Arguments in favor of voting via post are that the international review of electoral methods of the Venice Commission also refers to voting by mail. Moreover, in certain countries such as Italy, Germany and Austria, voting via post is the only possible way to vote from abroad.[38]

If one were to accept the principle that there is no relevant difference between these two groups and that legislature based on this fact, would extend them the possibility to vote via post, it would create undesirable consequences. Accordingly, all citizens regardless of the residency would have the right to vote by mail. The restriction to voting at embassies and consulates would not be a desirable solution either, since it would entail a drop in voter participation, in fact, the foreign representation offices (embassies and consulates) would be unable to cope with the voters through these unique channels. With the support of the parties, a gradual introduction of an electronically suitable voting method would be an advisable solution to the problem.[39]

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35 See e. g. Inequality in the Hungarian Electoral Law, https://hungarianspectrum.wordpress.com/2013/11/29/inequality-in-the-hungarian-electoral-law/, 20.1.2015.

36 *Trócsányi*, fn. 24, p. 84.

37 *Halmai*, fn. 2, p. 2; *László*, fn. 5, p. 5.

38 CDL-AD(2011)022. Rapport sur le vote a l'étranger.

39 *Pozsár*, fn. 18, p. 4.

3. Suffrage regarding ethnic minorities

Earlier, the Hungarian electoral system did not ensure national and ethnical minorities' favorable parliamentary representation. Up to now, the rights of minority individuals and groups were not prohibited from the possibility of nominating a candidate or an organization; however, the same rules and regulations for mandate procurement were applied to them as to those belonging to the majority of the people within the nation. According to the new laws, voters belonging to minority groups must now decide in advance whether to vote for a party list or a minority list.

The new laws confer to the nominating minority organizations two advantages: that is, that the five-percent threshold does not apply to them. Furthermore, that they are eligible for the first mandate list even with a quarter of the normally required votes. Even if and in spite of these favorable conditions should the candidate not acquire a list mandate, the leader of the organization will have the opportunity to participate in parliamentary works as spokesperson and have the right of consultation. The magnitude of the benefits which are ensured for minority candidates and nominating organizations are by far the largest that stand to reason within the equality of suffrage rights. The institution of the spokesperson ensures that representatives of minorities with the lack of necessary support from their voters will still be able to voice their opinions in parliamentary debates.[40]

There have been and still are debates in Hungarian legal literature pertaining to whether or not there were constitutional restraints in creating parliamentary representation for ethnic minorities.[41] In 1992, the Constitutional Court declared that there was an omission on the part of the lawmakers that resulted in the violation of the constitution, since it had not ensured the representation of the ethnic minorities.[42] Although the Constitutional Court confirmed that parliamentary representation is not a criterion for prevailing minority rights, it is not questionable that the most efficient way to ensure minority rights' legal protection is parliamentary representation. As an answer to this said decision, the Hungarian parliament in 1993 passed a law regarding ethnic minorities, allowing them to establish independent local governments.

Another criticized legal provision of the law is, that it states that ethnic minorities can vote either for a party list or for a minority list. According to the standpoint supporting this provision of the law, minority ethnical voters cannot acquire more votes than the voters belonging to the national majority.[43] Opposing this, it can be said that besides ensuring preferential parliamentary representation for ethnical nationals, there is a simultaneous restriction of their political representation which is considered unacceptable in a political community of equal persons.[44] In order to solve this problem, it was proposed to maintain the double voting system (one for individual districts and one for party lists) and allow spokespersons of ethnic minorities to be sent to parliament.[45]

It was put forth, that a complete parliamentary mandate is not even desirable considering the circumstances.[46] Hungarian minority laws recognize 13 national and ethnical minorities who, if they all acquire the possibility of a mandate would be an influential

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40 *Halmai*, fn. 2, p. 4.

41 Az új magyar választási rendszer (The new Hungarian electoral system), fn. 1, p. 28: footnote 35.

42 Constitutional Court Decision no. 35/1992. (VI.10.) AB.

43 *Halmai*, fn. 2, p. 4.

44 *Pozsár*, fn. 18, p. 3.

45 Id., p. 3.

46 *Halmai*, fn. 2, p. 4.

factor in parliament. Nevertheless, their voters' support would be missing.[47] As a result of the parliamentary elections of April 6, 2014, none of the minorities gained a preferential mandate. This can be seen as a failure of the system, but according to experts in the field, a larger problem was prevented by this method, that is: that the absolute or two-third parliamentary majority would have been dependent of the minority representatives.[48]

The report of the Organization for Security and Co-operation in Europe found objections pertaining to the statutory provisions of electing minorities as well. Quoting the report "By having to publicly register, and given that only one choice was available on the ballot for minority lists, their choice was limited and the secrecy of the vote was violated. As well, the measures did not appear to enhance their participation or visibility in the process."[49]

III. Significant amendments made to electoral procedural law of Hungary

1. Correction of single-member constituencies

Mainstream discussions were held at the Round Table Talks[50] in 1989, in which the Communist Party[51] in power decided single-handedly (since it was in their realm of competence) to establish the boundaries of single-member constituencies. These were announced to the opposition party at a round-table assembly only after the established boundaries had been approved by them. The democratic opposition offered no significant resistance to these pre-established boundaries, since the main discussions centered on other elements of the electoral system. Consequently, the boundaries of the constituencies were established by a decree of the Council of Ministers[52] in 1990 and had not been revised since that time (i. e. for over twenty years), despite the fact that during these two decades the boundaries of single-member constituencies became obsolete due to demographic changes.

In 2005, the Constitutional Court declared that an omission on the part of the parliament resulted in the violation of the constitution, because the parliament had not prescribed regular supervision of the boundaries of single-member constituencies.[53] According to the Constitutional Court, inequality in electoral districts violates the principle of equal suffrage. This said decision was once again reinforced in 2010 by the Constitutional Court,[54] since the parliament had not fulfilled the requirements which were to

47 Id., p. 4.

48 *László*, fn. 5, p. 6.

49 OSCE/ODIHR Limited Election Observation Mission Final Report – Hungary – Parliamentary Elections, 6 April 2014, Warsaw 11 July 2014, p. 2, p. 22–23, http://www.osce.org/odihr/elections/ hungary/121098?download=true.

50 The so-called Round Table Talks were a series of negotiations that took place in several countries of the Eastern Bloc between communists and the opposition. They were a key component in the collapse of the communist regimes and the smooth transition to democracy.

51 Formally known as the Hungarian Socialist Workers' Party or MSZMP.

52 The Council of Ministers in Hungary, during the socialist era, was the supreme body of administration which was liable for its management to the National Assembly.

53 Constitutional Court Decision no. 22/2005. (VI. 17.) AB, see (Engl.): http://www.alkotmanybirosag.hu/letoltesek/en_0022_2005.pdf.

54 Constitutional Court Decision no. 193/2010. (XII. 8.) AB, summary of the decision (Engl.): http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2010-3-008?fn=document-frameset.htm$f=templates$3.0

eliminate this unconstitutional situation already declared as such in 2005 by the same court, even though the deadline to do so was set for the 30 June 2007. This unconstitutional situation was maintained even after this date. A study that had been drawn up concludes that the governing political powers of the time – who are now in the opposition – had no interest in changing the boundaries of the constituencies.[55] This lack of commitment of the governing political parties at the time did not only not sanction those modifications requiring two-third majority, but did not even sanction the law regarding the boundaries of single-member constituencies modifying the unequal single-member constituencies which only required a simple majority.[56]

The objective of Act CCIII of 2011 on the elections of members of parliament was to establish the constitutional requirement of equal suffrage by new provisions regarding the establishment of boundaries of single-member constituencies. This objective was also welcomed by the Venice Commission,[57] which nevertheless objected to the fact that within certain counties, the voter count of certain constituencies exceeds the internationally accepted ten-percent limit. In compliance with this new act, the parliament can only amend the boundaries of single-member constituencies if the number of its voters surpasses the twenty-percent limit (that is if a county's boundaries are modified). In harmony with the international standards, the provisions of the law state that such modifications cannot be made in a parliamentary election year, or the year prior to it. At the same time, the recommendations of the Venice Commission are to the effect that the lawmakers should re-examine the electoral districts every ten years (or even more frequently). As a result, the parliament would not need to wait for the twenty-percent limit to be surpassed.

The Venice Commission recommends that this revision be accomplished by an independent, permanent or temporary transparent commission that should include a geographer, sociologist, an equal number of representatives of parliamentary parties, and, if appropriate, representatives of minority groups. Only with these requirements put in place can political influence and "gerrymandering" be avoided.[58]

The Venice Commission also objected to the fact that the new provisions of the act establishing the boundaries of single-member constituencies had to be adopted by two-thirds majority in parliament. In the Commission's view, district designations should only be applicable for qualified majority, and not concrete boundary subdivisions.[59] They also emphasize that the setting up of electoral districts should be the result of extensive political consensus.[60] Hungarian legal literature also criticized this solution, saying that it created a "politically manipulated electoral map".[61] As opposed to this, a study introducing the new elements of statutory provisions in electoral matters points out that there are no suspicious electoral districts on the map with unusual shapes that could lead to "ger-

55 Az új magyar választási rendszer (The new Hungarian electoral system), fn. 1, p. 18.

56 Id., p.18.

57 Opinion No. 662/2012, CDL-AD(2012)012, http://www.venice.coe.int/docs/2012/CDL-AD%282012%29012-e.pdf.

58 The Boundary Commissions in Great Britain are similar to this solution.

59 *F. Fazekas*, A Velencei Bizottság 2012. júniusi véleményei öt sarkalatos törvényről (The opinion of the Venice Commission in June 2012 about five cardinal statutes of Hungary), Fundamentum no. 2012|2, p. 90, p. 92, http://www.fundamentum.hu/sites/default/files/12-2-12.pdf.

60 Id., p. 92.

61 *László*, fn. 5, p. 5.

rymandering". Actually, districts with odd shapes were more frequent in the former regime, for instance, in the counties of Komárom-Esztergom or Szabolcs-Szatmár-Bereg.[62]

On the other hand, the present two-third governmental majority being otherwise in a favorable position as such regarding gerrymandering, has established an unalterable set-up for any other future leading party in power without a two-third majority.[63] If two-third majority is concentrated in the hands of only one political power, the boundaries of the constituencies can be modified without any significant control.[64] If however, political parties in opposition unite to form a two-third majority, it is unlikely that they would reach an agreement.[65] An opposing standpoint to this is the fact that modifying boundaries of electoral districts requires a two-third majority.[66] This in itself serves as a guarantee for avoiding gerrymandering, since it is difficult to reach a two-third majority without political consensus.

This criticism relating to electoral districts brings up a more general problem, that is: how does a two-third majority ensure or block the demands of an established broad political consensus? The Venice Commission's opinion on the Hungarian Fundamental Law[67] and further on, regarding the five Hungarian cardinal acts of 2012, emphasizes the fact that the subject of the basic principles contained in the cardinal laws must be tied to a two-third majority. The examined laws on the subject however, surpass the provisions of the cardinal acts, include not only basic principles and the levels of the regulatory framework to be applied, but also include many more detailed provisions. In such a case, more than a simple majority would be required to modify them, and thus, they violate the principles of democracy.

A decision of the Hungarian Constitutional Court examining the regulatory level of the electoral districts states that "for passing any law defined by the Constitution requiring qualified majority, it is not only a formal instruction for legislative procedure but it is also a constitutional guarantee to create broad agreements between parliamentary representatives".[68]

However, the Venice Commission does not consider a two-third majority a requirement for it to be sufficient to create extensive political consensus.

In our opinion, these critics are not especially focusing on the exact proportion of the majority but rather as the Hungarian legal writings refer to it – what concerns them is whether the necessary two-third majority is in the hands of a single political power. Hungarian scholars also focus on the fact that in case of a simple governing majority, the function of the two-third majority (i. e. be forced to reach a compromise with the opposition parties) cannot be accomplished if the government has two-third majority in parliament by itself.[69]

The Venice Commission suggests that an equal number of representatives of parties should participate in the decision making of electoral districts' creation. However – from our point of view – this brings up the problem that by this method the smallest party's

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62 Az új magyar választási rendszer (The new Hungarian electoral system), fn. 1, p. 11. The comparative map is available on p. 12.

63 *Halmai*, fn. 2, p. 1.

64 *László*, fn. 5, p. 3.

65 Id., p. 3.

66 Az új magyar választási rendszer (The new Hungarian electoral system), fn. 1, p. 21.

67 Opinion No. 621/2011, CDL-AD(2011)016, http://www.venice.coe.int/docs/2011/CDL-AD%2820 11/CDL- AD%282011%29016-e.pdf.

68 Constitutional Court Decision 193/2010. (XII. 8.) AB cited Decision no. 1/1999. (II. 24.) AB. The latter decision is available in English: http://www.alkotmanybirosag.hu/letoltesek/en_0001_1999.pdf.

69 *Halmai*, fn. 2, p. 6.

opinions have the same weight in the decision making as the one with a two-third majority. The better political consensus we seek, the further we get from enforcing the will of the majority, thus moving away from the principles of democracy.[70] If unanimous consensus were prescribed for a decision, that would raise the minorities' power up to being equal with the majority's level, as minorities they would have the right of veto of all proposals of the majority party in power.

According to the practices of the Hungarian Constitutional Court, when enforcing the requirement of a two-third majority, it is important to analyze "what the basic elements of the provisions defined by the two-third majority law are", in other words, what the essential normative content of the provision is.[71] Thus, the Constitutional Court – regarding the requirements of two-third majority arising from the function of extensive consensus in qualified majority – analyses to what subject matters the requirements of comprehensive consensus apply. This in particular cases requires the analysis of the will of the constituent power and the historical background of the regulations as well.[72]

Regarding the above mentioned issues, the fundamental principles, provisions and guarantees that provide the framework of the formation and modifications of the electoral system are in direct relation with the enforcement of suffrage and the principles of equal suffrage. According to the Constitutional Court – when creating guarantees that are defined in the two-third majority laws – when establishing concrete boundaries of single-member constituencies, simple majority adoption of the law is sufficient. This way equal suffrage and flexibility of legal provisions can be ensured at once, as these principles are considered to be essential elements in establishing the constituencies by the Constitutional Court.

At the same time, our analysis regarding the intention of the constitutive power shows us – that is: the content of the constitution – that it is not obvious that the intention within it, requires two-third majority for establishing single-member constituencies. The normative basis for this is the "Cardinal Clause" in Act CCIII of 2011, on the elections of members of parliament, paragraph 25, which declares that this act including its Annexes shall qualify as a cardinal act. This provision is the so-called "Cardinal Clause" which is only declarative, thus, it cannot constitute or justify a statutory provision to be Cardinal (i. e. it can be adopted and modified only by a two-third majority). If it were so, any governing majority with an adoption of simple majority could at a later date adopt new legislative provisions amending it to a two-third majority status and in this manner making the statutory provisions more difficult to amend by the following governments. The "Cardinal Clause" in paragraph 25 of the Act, refers to those provisions of the Fundamental Law as the legal basis of the two-third majority[73] that – compared to the provi-

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70 For further details about this debate see: *B. Gbikpi/J. R. Grote*, From Democratic Government to Participatory Governance, in: *J. R. Grote/B. Gbikpi* (eds.), Participatory Governance. Political and Societal Implications. Wiesbaden 2002, p. 17–35.

71 Constitutional Court Decision no. 31/2001. (VII. 11.) AB; Constitutional Court Decision no. 90/2007. (XI. 14.) AB. The latter decision is available in English: http://www.alkotmanybirosag.hu/letoltesek/en_0090_2007.pdf.

72 Constitutional Court Decision no. 4/1997. (I. 22.) AB. Available in English at: http://www.alkotmanybirosag.hu/letoltesek/en_0004_1997.pdf); Constitutional Court Decision no. 66/1997. (XII. 29.) AB. Summary is available at: http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1997-3-012?fn=document-frameset.htm$f=templates§3.0); Constitutional Court Decision.no. 31/2001. (VII.11.) AB; 90/2007 (XI. 14.) AB; 4/1999 (III. 31) AB; Summary is available at: http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hung-1999-1-002?fn=document-frameset.htm$f=templates$3.0).

73 According to para. 25. "This Act, including its Annexes, shall qualify as cardinal Act pursuant to Articles XXIII (4) and Article 2 Subsection (1) and (2) of the Fundamental Law."

sions of the constitution in similar contexts – do not justify the difference from the previous interpretation of the Constitutional Court, i. e. the establishment of the boundaries of single-member constituencies requires only a simple majority.

2. Amendments to the statutory provisions on election campaigns

a) Campaign financing

The new provisions regarding campaign financing enable every party that sets up a national list for the elections to receive an expense account budget up to 995 million Hungarian forints (HUF), from which 150–160 million can be derived from state budget depending on the support of the party. The funding of candidates in single-member constituencies has not changed as compared to the former statutory provisions; therefore, they still get one million forints financial support from the central national budget for their campaign.

The sharpest criticism in connection with this is that while individual candidates still get one million forints of public financial support for their campaign through a treasury card, they are put to strict accountability for their campaign expenditures, while political parties are not really obliged to account for the proportionally increasing and directly transferred financial support that they get for their registered candidates. Another difference is that while individual candidates are obliged to repay the one million forints if they do not reach the required minimum of two percent of the votes, the party that sets up a national list for the elections is not obliged to repay (a large amount) the financial support even if the party did not get into the parliament.

The new statutory provisions do not create a real transparent framework for campaigns financing according to criticism – whose source of financing comes from the state budget with the funds derived mainly from public funds.[74] Thus, in this manner, the former restrictions of freedom of information still prevail and the voters are unable to actually follow where their tax forints are spent in the campaign. Even critical scholars admit that there are some positive elements in the amendments of the campaign financing, i. e. the treasury card, the increase of the upper limit of funds allotted to campaign expenditures.[75] However, with the introduction of expenditures of public financial support for campaigning without any actual control and with the differentiation made between candidates and party lists, the law quasi encourages the population to form fake parties.[76] The abuses in the campaign of 2014 proved that this fear was not unreasonable.[77]

It would be practical to introduce the requirement of strict accountability; furthermore, to prescribe the refund of public financial support through legislature regarding political parties in similar situations as individual candidates.

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74 *Pozsár*, fn. 18, p. 8–9.

75 *László*, fn. 5, p. 7.

76 *László*, fn. 5, p. 7: footnote 13.

77 *László*, fn. 5, p. 7.

b) Putting an end to "campaign silence"

One important innovation of the new procedural law is that – as opposed to the former provisions – "campaign silence" has been abolished; the Constitutional Court declared several times that within a given framework, campaign silence can be considered to be constitutional. Actually its constitutional function can be defined as the possible guarantee of the elections to remain undisturbed. In practice, it turns out to be quite difficult to enforce and control. As campaign silence violated the freedom of expression, academic legal literature welcomed this modification mainly with respect to the enforcement of voters' rights.[78]

Act XXXVI of 2013 on electoral procedures, introduced the prohibition of relative territorial campaign on Election Day. According to this provision, no election campaign activities were permitted on public domain within 150 meters of the designated building's entrance that is used to allow access to the polling stations. In order to prevent difficulties in interpreting this provision on Election Day, the National Election Commission previously published an explanatory guideline.[79] The main problem resides in knowing whether or not a poster placed within the 150 meter zone belonging to the public domain, previously to Election Day also had to be removed on Election Day.

The guideline elaborated on the fact that the prohibition of relative territorial campaign forbids concrete campaign activities on Election Day. Furthermore, it stipulated that it was not necessary to remove posters which were legally put in place within a 150 meter zone before Election Day. The guideline also states that if any display of activity promoting any party can be seen or heard, within the polling station or in the building or within the limits of a 150 meter zone on the public domain, that meant the prohibition of relative territorial campaign has been violated. This also concerns instruments of publicity which are placed beyond the 150 meter limit. However, the guideline did not clarify what activities can be conducted in private areas situated within the 150 meter limits. Should the prohibition of relative territorial campaign be extended to the private sector, this would violate the principles of sanctity of private property. Campaign posters placed on passing vehicles do not necessarily violate the prohibition of relative territorial campaign. The violation of the prohibition is achieved only if the said motor vehicle circulating within the given 150 zone is seen passing by more frequently than public transportation vehicles schedules, or is regularly parked within the 150 meter zone.

The guideline also defined the personal scope of the prohibition of relative territorial campaign, declaring that neither the voters, nor the members of the election bodies (i. e., election commissions and election offices) should carry on such campaign activities in the building of the polling station or in the polling station itself. The content of the guideline of the National Election Commission resulted in a relatively clear interpretation of these provisions and it helped the polling stations carry out adequately the activities. A clear proof of this is that only five petitions arrived to the National Election Commission that criticized the posters placed on Election Day. However, it could not be established whether these posters had been in place on Election Day or before.

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78 *Pozsár*, fn. 18, p. 6.

79 Decision no. 11/2014. NVB.

3. Legal disputes regarding the basic principles of electoral procedure

a) Equality of opportunity between candidates and nominating organizations

Restrictions on the publishing of political advertisements: Several questions were raised in connection with the publishing of political advertisements during the general election campaign of 2014. The discussions were partly regarding the issue of which campaign methods would be permitted and which would be barred. Considering the Supreme Court of Hungary's (Kúria) judges' overall experience, the problem of freedom of speech in the general elections of 2014 was: to be able to make a distinction between statement of pure facts and expression of one's opinions.[80] However, this problem was brought up less frequently in the discussions as compared to previous general election campaigns, resulting in political advertisements playing a lesser role in the campaign. This was well reflected in the lack of TV programs broadcasting political debates. Simultaneously, the roles of online social webpages took on a greater dimension, with increased use of symbols and logos in advertisements, and appeared to be more colorful as compared to previous general election campaigns. The Constitutional Court was given the authority to revise court rulings issued in proceedings for legal remedy regarding the resolutions of Electoral Committees.[81] This served as a new and important guarantee in the electoral system.

The new Act on Electoral Procedures[82] established basic principles according to which the Electoral Committees and the Courts of appeal were required to examine the different cases put forth to them and decide whether or not the given campaign activity violated the principles of equality of opportunity for the candidates and whether they exercised their prescribed rights in good faith in orderly manner. One of the legal debates concerned a situation where a campaign video showed a monkey mimicking the voice of two parties' presidents. One of the TV stations refused to broadcast this video. The National Election Commission (NVB), the Supreme Court of Hungary (Kúria) and the Constitutional Court established unilaterally that the fact of identifying man with an animal was dehumanizing and therefore violated human dignity.

Another legal debate was concerning a picture that came up on one of the candidate's Facebook pages. This picture showed an orange (it is well known that the orange color symbolizes the governing political party in power), sliced in the shape of a Teutonic cross and below it, appeared the *Jobbik Party's* (far right opposition party) logo with the following slogan: "Do not have illusions, if one scratches the surface, something like this will appear". In this instance, the main issue was – in connection with the principles of freedom of speech and expression – whether symbols of totalitarian regimes can be used for negative campaign purposes. The Supreme Court of Hungary (Kúria) decided that the use of totalitarian regime symbols did not fall under the protection of Article IX paragraph 1 of the Fundamental Law of Hungary with regard to freedom of speech and expression.

In another instance, allegations of a local government delegate were publicized in flyers and in the press, stating that he cast positive votes for everything to be voted upon

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80 *J. Kovács Téglásiné* , Vélemény- és sajtószabadság (Freedom of expression and press freedom), in: *L. Csink* (ed.): Alkotmányjog. Novissima, 2014, p. 45; *A. Patyi*, Protecting the Constitution. The Characteristics of Constitutional and Judicial Review in Hungary 1990–2010, Passau 2011, p. 42–44.

81 *Cs. Cservák*, A választási szervek szabályozása, különös tekintettel a Nemzeti Választási Bizottságra (Regulation of Electoral Committees, with special respect to the National Election Commission), in: *Á. Cserny* (ed.), Választási dilemmák. Nemzeti Közszolgálati Egyetem, Budapest 2015, p 11, p. 24.

82 Act XXXVI of 2013 on Electoral Procedure.

(in other words a YES man) thereby causing the population to increase its expenses. In this case, a distinction between a statement of fact and an expression of one's opinion needed to be made. Initially, the Kúria found that if the right of expression was practiced in a way that certain facts were withheld or distorted in order to mislead people, it was no longer qualified as a simple expression of one's opinion, but it was rather to be considered as stating falsified facts which, in effect, were forbidden by the new Act on Electoral Procedure.[83]

In another case, a candidate participated in the distribution of the apples he had donated to a nursery. This event was also published on the local online portals, which caused resentment from a candidate of an opponent party. Here, the main issue was whether this seemingly charitable event remained as such, or was it to be qualified as a political endeavor, in which case, it is prohibited by the laws on public education. The Kúria's decision was based on the fact that because of the online publishing of the distribution of such a donation, it became known to the public at large; therefore, it could in effect be qualified as campaign activity in order to have a favorable influence on the voters, thereby going against the principles of equal opportunities for delegates, and thereby derogating to the proper conduct of good faith (i. e. the exercising of rights in good faith in accordance with their purpose).

The most prominent debate, however, was engendered by the display of posters. In one instance, the Electoral Committees and the appointed courts supervising these committees had to decide whether advertisements could be permitted on sidewalks and not be governed by any rules or regulations and notwithstanding the permission of the owners of adjacent properties. It so happened that a start-up political party spray-painted an advertisement on the roadway, inciting the population to vote for this party. It was also added that the spray paint would disappear. In this instance, the Kúria pointed out that theoretically the basic rule was that advertisements could be displayed without restrictions and without the adjacent property owners' consent.

Another issue concerned the display of electoral advertisements on lamp posts. Here, the legislator intervened and took action, by government regulations on the display of posters along public roads, to include political advertisements as well. As a result of this, this portion of the statutory provisions regulating campaign activities now fall under normative regulations of government, thereby limiting the authority of the provisions of the Act on Electoral Procedure. However this intervention of the government resulted in diverging court judgments.

A concrete case was raised because Electoral Committees prohibited the display of electoral posters on lamp posts along highways. There was a divergence of legal opinions between the Electoral Committees and the Kúria because they each interpreted the law in a different fashion. As a matter of fact, the Kúria itself rendered two diverging judgments concerning this same issue. It furthermore raised the problem of the possibility of grievances with regard to equal opportunities between candidates. The Kúria justified its revised judgment as opposed to the previous one, because in the latter appeal for revision, the facts were far more detailed and extensively elaborated with relevant legal arguments, as opposed to the former appeal which was superficial and did not contain the arguments of the latter.

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[83] Judgment no. Kvk.IV.37.488/2014/3. The Kúria referred back to a European Court of Human Rights Case of *Lingens v. Austria* and Constitutional Court Decision no. 36/1994. (VI. 24.) AB, available in English at: http://www.alkotmanybirosag.hu/letoltesek/en_0036_1994.pdf.

Possibility of campaign activities of the government and civil societies: The parliamentary general elections of 2014 were strongly criticized because the political parties' media campaign was restricted to public service media (TV Channels) which were strongly influenced by the governing political parties.[84] Commercial TV channels were allowed to broadcast political advertisements only if they provided equal time share for each political party, and this had to be free of charge. However, this did not happen for all intense and purposes, because commercial TV channels naturally did not indulge into such undertakings not being lucrative.

According to the Organization for Security and Co-operation in Europe's report:

> The campaign was subdued overall and almost indiscernible in rural areas. The tone of the campaign was negative and dominated by allegations of corruption at the expense of discussion of substantive issues. The use of government advertisements that were almost identical to those of Fidesz contributed to an uneven playing field and did not fully respect the separation of party and State, as required in paragraph 5.4 of the 1990 OSCE Copenhagen Document.[85]

It is worth bringing back to memory the preambles of the regulations governing the publishing of political advertisements by way of media services. The first version of the Act on Electoral Procedures was adopted in 2012, limiting political advertisements to be published/broadcast solely by way of public service media. The President of the Republic of Hungary used his constitutional power to veto this said act, after which the Constitutional Court rendered the said act null and void.[86]

The Constitutional Court alleged that the reason for its decision was that "these said provisions would have taken away the chance of publicizing political advertisements in those media that have a wider range in reaching the population at large". Furthermore, "restricting political adverting hinders not only the right of speech and expression of political parties, but it also has the disadvantage of not servicing all individuals and organizations". Since, everyone is welcome to take part in the discussions regarding public affairs; being that "the issue of political advertisements is a part of the fundamental rights of freedom of information, it therefore automatically gives the right of the electors to be informed."

Besides justifying majority rule, *Justice Béla Pokol's*, one of the Constitutional Judge's dissenting opinion is noteworthy, in that he disagreed with the fact that excluding the mass media from political campaign advertisements violated the Fundamental Law. He is of the opinion that this provision of the Law, had it not been stricken, would have drastically reduced the most expensive item in an election campaign, since political advertisements in commercial TV channels cost millions by the minute, thereby generating debts within the political parties and as a result giving way to political corruption due to these high financial demands.

According to *Justice Béla Pokol*, these regulations would have stopped this from eventually happening. Moreover, this is justifiable by pure democratic political will as a constitutional value. He drew attention to the fact that in the light of the forthcoming general elections, according to his expertise, it would be most appropriate to consider

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84 See *M. Haraszti*, Népszava 2014. március 4. Nem lesz tiszta a választás (The elections will not be fair), http://nepszava.hu/cikk/1012596-nem-lesz-tiszta-a-valasztas.

85 OSCE/ODIHR Limited Election Observation Mission Final Report – Hungary – Parliamentary Elections. 6 April 2014, Warsaw 11 July 2014, p. 2, p. 12–13, http:www.osce.org/odihr/elections/hungary/121098?download=true.

86 Constitutional Court Decision no. 1/2013. (I. 7.) AB, in English: http:www.alkotmanybirosag.hu/letoltesek/en_0001_2013.pdf. For further analysis of this decision see, *T. Drinóczi*, Dialogic Interaction and Legislation on Parliamentary Election in Hungary 2010–2014, Osteuropa-Recht 4|2014, p. 452, p. 459.

further constitutional interventions in order to avoid inequality between governing and opposition political parties' participation in media advertising coverage.

After amending the Fundamental Law a fourth time regulating political advertisement restrictions, and because of international pressure,[87] the Fundamental Law was amended a fifth time, partially repealing these restrictions concerning the regulations of public broadcasting. Nevertheless, it maintained the obligation of free broadcasting in the Fundamental Law.

According to legal critics, the lifting of the restrictive regulatory measures was virtually of no avail, since none of the commercial TV stations agreed to broadcast political advertisements free of charge, since by doing so they would fall short of paying lucrative customers.[88] Thus, the fact that the Fundamental Law was amended a fifth time, did not change matters because the former amendment still had its weight on limiting freedom of speech and expression due to the fact that commercial TV channels reaching a large range of the population were in no way willing to broadcast free political advertisements in any way.

The main criticism in legal literature concerns the fact that governing parties take advantage of their governance allowing them to display their posters on platforms that are unavailable to other political parties.[89] As opposed to other political parties, paid advertisements on TV channels and radio stations of governing parties can appear in commercial media, as they do not fall under the jurisdiction of the Act on Electoral Procedure. In public service media, political parties have a maximum of 470 sharing minutes allotted to them overall for advertising purposes, whereas the governing parties have unlimited media time for this same purpose.

There are no restrictive measures regarding civil societies' campaign activities. Moreover, their commitment to accountability is nowhere near the ones of political parties. As a direct result, political parties with more favorable financial backgrounds get disproportionally greater advantage over the lesser fortunate parties, as they can outsource part of their campaign activities to civil societies giving them the opportunity to exceed the permitted limit of 995 million Hungarian forints as expenditures.

Criticism maintains that not only do the restrictions on political advertisements go against European constitutional practices, but it also maintains that meanwhile this is happening; no legally set rules limit governmental activity on campaign publicity which is concocted for the purpose of favorably influencing the electors.[90]

As a solution to this unfair practice it was suggested that on every campaign activity level, where it is forbidden for political parties to advertise on certain platforms, the same measure should prevail and be applied to the government, local governments and civil societies equally as well.[91] In addition, it was strongly suggested that civil societies' political campaign activities also be strictly regulated.[92]

Abiding by former regulations, legislation still did not commit itself with regard to political advertisements in electoral campaigns or other political advertisements, neither about government nor of other public service and civil societies' campaign advertisements.

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87 See e. g. the Opinion of the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary. CDL-AD(2013)012, p. 10–12.

88 *Pozsár*, fn. 18, p. 5.

89 *László*, fn. 5, p. 5.

90 *Pozsár*, fn. 18, p. 11.

91 *László*, fn. 5, p. 7.

92 Id., p. 7.

As passed experience shows, that even in campaigns elections, the government advertises messages of similar content to those of the government parties. These advertisements reach a population which is inaccessible to the other political parties in opposition because of the restrictions imposed on them by the regulations contained in the Electoral Law. Since the ruling political parties are not subjected to this said Law, this situation creates unequal opportunities between the political parties in election campaigns. Because of the lack of proper regulations, Electoral Committees and the designated courts had to take a stand on the question of the participation of the state and the local governmental bodies in electoral campaigns.

The former Electoral Law stipulated that the principles of electoral procedure had to be applied only by those participating in the elections. By "those participating in the elections" they meant formerly, that the government and the local governments did not fall under the jurisdiction of the Electoral Law since they are deemed to be self-contained and self-administered entities.

Now, the new Electoral Law excludes such exceptions; moreover, it stipulates that campaign activities are not only activities during the campaign season referring to campaign instruments, but they also include all campaign activities in the campaign period, liable of influencing the voters choice and used to enhance their popularity and votes. The Kúria is of the opinion that a new situation has emerged as compared to the former Electoral Law in effect at the time. It ruled that the Electoral Law regulations must be applied in every situation, when a violation of the Electoral Law is suspected regardless of the person committing said violation.

One of the first of the cases emerged in connection with a local government's activities. It published its achievements on a poster in order to gain popularity. The Kúria rules that it was not only the local government's right but also its invested obligation to report to the electors regarding accomplishments within public office activities and the results thereof. In some instances, however, it so happened that two posters (one of the local government and the other of the local governing party) touched each other and were similar in colors and graphical design, thereby helping the posted candidates gain popularity.

In connection with the above the Kúria stated the following:

> Healthy operations of democracy are unimaginable without political plurality. Furthermore, equality of opportunity of parties in the political race for power is essential. The legal framework demanding equal requirements ensures the neutrality of the state in the competition between political parties. These requirements apply to local governments as well. Since they are possessors of the local executive power, they cannot compete for parliamentary mandates; neither can they race against a candidate or a candidate nominating organization. Similarly to the state, local governments are under the obligation of guaranteeing equal opportunity of expression to all the different political party's without giving preferential treatment to citizens involved in politics. The state and the local governments as local executives of public power are forbidden to influence pro or con, the race between political parties.

The Kúria interpreted the provisions on campaign activity restrictions together with the principle of equality of opportunity of candidates. The equality of the political parties is quite a "marshy" territory, partly because of the fact that parties substantially differ from each other and partly because in such matters the state is deeply involved. It is an unstable ground and of a discretionary domain where the state and the acting judicial authorities have the right to take decisions on the merits they perceive.

However, during the general elections of 2014, local governments also being active in the election campaign did not violate the principles of neutrality. One of the capital districts' local governments incorporated a code of ethics into the election campaign. This code was signed by the candidates, candidate nominating organizations and representatives of the local media. The local government volunteered to provide the possibility of free advertisement platforms in the local TV channels and the press to those who

would sign the said code of ethics. This would be put to a draw at random. This said activity was challenged but it was upheld in a judgment by the Kúria. In this case the principle of equality of opportunity was not violated as the local government provided the same opportunities equally to all those who did not sign the code of ethics but could have had they wanted to do so. The Kúria established that the local government did not have the obligation to issue a code of ethics, but since it did, it had the obligation to ensure equality of opportunity to all participants, in accordance with the aforesaid principle.

The following legal question was concerning the presence of different candidates and candidate nominating organizations in the local media. Initially, the local newspapers and periodicals were qualified as media products according to the Media Law. Thus, media products bear the responsibility for their products during the election campaign. The recurrent problem is the following: is it considered a campaign advertisement to publish an article in a local government's publishing, in favor of or to the detriment of a candidate? In no case did the Kúria consider this as a political advertisement, since the condition for it to be a political advertisement is that it must be done against remuneration, and this was not proven in this instance.

However, the principle of equal opportunities also has to be applied here. In another decision the Kúria articulated that

> the equality of opportunity of an electoral race is violated when, without reasonable justification, a nominating organization or candidate receives such support and help during the campaign period that privileges him as compared to other nominating organizations or candidates. The fact that a local executive power gives up its neutrality in the election campaign to support a candidate or nominating organization violates the principles of equality of opportunity.

In another instance, a candidate objected to the fact that a commercial society belonging to a local government, published in its newspaper two articles side by side violating the principles of equal opportunities between the candidates and the nominating organizations and had not complied with its legal obligation of acting in good faith (i. e. with the principle of the exercising of rights in good faith in accordance with their purpose). In this instance, the Kúria determined that both principles had been violated. Nonetheless, it declared that multiple publications in local government papers of prominent local government personalities were, generally speaking, not reprehensible. But in this case, seeing that the local government's publication representing local executive power took place within the election period, it violated the principle of equal opportunities, due to the fact that within the timeframe of the election campaign the local executive power gave up its neutrality in favor of a candidate or a nominating organization.

Even if local newspapers omit publishing political advertisements per say, they can still use it to disrupt equality between candidates and nominating organizations at a local level. The Constitutional Court's decision[93] revising the decision of the Kúria examined this case in connection with the rights of freedom of speech and expression and its compatibility with the principles of the freedom of media/press. The Constitutional Court pointed out that in an election period as well as at other times, it is of utmost importance to ensure that wide-range coverage of information reaches the population at large.

The Constitutional Court emphasized the foremost importance and the recognition of the freedom of the press and prohibiting the state to interfere with the content of the newspapers. However, under certain constitutionally justifiable circumstances it can become necessary to prescribe certain requirements to the press, regarding the communication of public information. These requirements are not only applicable to commercial media providers' activities, but it also covers media products derived from public funds.

93 Constitutional Court Decision no. 3096/2014. (IV. 11.) AB.

Therefore, from a constitutional perspective, one cannot object to the fact that during the election period, the courts apply stricter rules for state-owned media in a broader sense and local government's obligation to act in good faith according to suffrage right than under normal circumstances (i. e. not in election campaign).

In another case, the Kúria had to examine an article published by a local newspaper to establish whether or not there was a violation of principles relating to good will and legal (civil) right practices (i. e. the principle of exercising of rights in accordance with their purpose). The Kúria elaborated on the meaning of this principle, that is: one can only establish the violation of these principles and declare it as such if it exceeds a simple violation of the law, i. e. there must be a premeditated intention to misuse the content of the law. Therefore, with regard to electoral campaign activity, the Kúria prescribed a uniform interpretation of the principles of equality of opportunity and legal (civil) right practices (i. e. the principle of exercising of rights in accordance with their purpose).

It so happened that, in one instance, the government broadcast a fifty-second advertisement in a commercial TV channel (TV2) using the slogan "Hungary Performs Better". The opposition parties requested the Kúria to render a decision on the issue of whether or not this was qualified as a political advertisement or not. In this matter the National Election Commission held the position that according to the Media Law, it could be considered as a public service announcement or an advertisement serving public interest.

By comparison, the Kúria stated that if the elements defining political advertisements are established, it is qualified to be a political advertisement independently from its sponsor. Therefore, a given TV broadcasting program is qualified as a political advertisement if the program promotes the nominating organization's goal and slogan. Although this decision came from another direction, its theoretical content was set forth in a former decision of the Kúria, that is: if the state sides with, and backs a nominating organization in this instance, it violates the Law. The interpretation of the independent court therefore clarified the said question with respect to legislation and the critics were answered thereby.

b) Legal debates with regard to the violation of secret ballot

The National Election Commission, prior the elections issued a guideline[94] regarding the removal of the polling carton paper boxes from the polling station and picture taking. This guideline interpreted the constitutional basic principle published in the second article of the Fundamental Law, paragraph 1, regarding secret ballot, meaning that it is forbidden for voters to take a picture of the ballot they retrieved from their envelope, by way of any telecommunication, digital or other information technology tools. Said ballot must be dropped into the ballot box without showing it to any third party for any reason whatsoever.

In its decision bearing number 1120/2014, the National Election Commission declares as a general application of rule, that the voters in a polling station cannot individually take photos of each other. This, as compared to the National Election Commission's previous guideline, forbids picture taking overall, not only of ballot cards, but also of each other in polling stations, regardless of whether the ballot card is seen or not on the picture (because it is placed in an envelope).

The National Election Commission did not base its decision which prohibits voters from taking pictures of polling cards before dropping them into the polling box and for-

[94] Decision no. 12/2014. NVB.

bidding picture from being taken in polling stations, not because of the fact of taking these pictures but rather because of a backlog situation it might create, because these picture taking voters who are bound to spend more time in the polling stations thereby disrupt the peace and prevent other voters from exercising their rights to secret ballot. At the same time the National Election Commission within the same decision did not find it worrisome – from the secrecy of suffrage point of view – the use of mobile polling carton paper box outside polling stations, as this was also criticized by a complaining voter.

There is no justifiable legal substance to investigate with regard to secret elections, when concrete evidence is lacking such as (declarations, documentations, testimonies, material evidence); thus, the burden of the proof lies on the shoulders of the person making the complaint as to the obstruction he or she suffered in exercising his or her voting rights. The possibility of an abstract danger of offense is not sufficient to introduce and conduct substantive investigation procedures.

Neither did the National Election Commission establish the violation of secret ballot because of the fact that a vote counting member of the polling station commission looked at a voter's ballot card who had returned his ballot because of a mistake he had made when filling it out. According to the stipulations mentioned in decision number 1121/2014, before taking the ballot card to the ballot box, the ballot card with the error was returned freely (by the voters own free will) to the counting committee. The members of the Committee, in accordance to Article 182, paragraph 2, of the Act on Electoral Procedure, establish the statutory right of the members to check ballots for verification purposes.[95]

4. The multiple recommendation system

One of the most criticized and problematic elements in the Hungarian electoral regulations was the collection of recommendation slips which was necessary for the nomination of a candidate. The former nominating system was upheld as constitutional by one of the first decisions of the Constitutional Court.[96] Nevertheless, even after this said decision, the recommendation slips continued to get a great amount of criticism from professional spheres. Furthermore, the Constitutional Court in several instances and decisions dealt with the recommendation system and its misuses.

In relation to the above, the Constitutional Court declared that the legislature had the possibility to choose from various versions of the recommendation and nomination procedures which were applicable to the constitutional conformity of the Electoral Law. However, misuse of the recommendation slips could not be totally overcome.[97] Nevertheless, the Criminal Code provided sanctions for the misusers.[98]

Notwithstanding the Constitutional Court, the Data Protection Commissioner regarding data protection likewise qualified the collection of recommendation slips and the management of data protection during the campaign, to be disturbing in many ways.[99]

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[95] Act XXXVI of 2013 on Electoral Procedure, Article 182, para 2: If a voter indicates to the polling station commission before placing their ballot paper in the ballot box that they made a mistake when filling it in, the ballot paper shall be taken back by the polling station commission and placed in a separate envelope kept for this purpose, and a new ballot paper shall be issued to the voter. The polling station commission may only replace ballot papers in this manner once for each voter and for each type of ballot paper.

[96] Constitutional Court Decision 2/1990. (II. 18.) AB.

[97] Constitutional Court Decision no. 19/1994. (IV. 1.) AB.

[98] Constitutional Court Decision no. 1243/B/1993. AB.

[99] Constitutional Court Decision no. 381/H/2002; Constitutional Court Decision no. 750/H/2006.

The Data Protection Commissioner's recommendations, in general, with regard to data protection, were to the effect that the recommendation system, because of personal data being collected and stored, in which specific political convictions were incorporated and mass handled, was troubling. He found that from the standpoint of managing mass personal data, this procedure was completely useless and dangerous.

In addition, criticism was raised against the processing of recommendation slips, because they were mailed by the electoral register office, to the electorate with all their personal data, ready to be filled out by them, together with the registration notification. This often resulted in a serious problem of theft from mail boxes, recommendation slips and the registration notifications vanished into thin air, thereby putting the personal data of these voters in peril.[100] The citizens claimed that their slips were copied by candidates.[101]

Based on the new electoral regulations, the former problematic recommendation system was abolished and was replaced by a new system. The recommendation of a candidate is now done by collecting signatures on official recommendation sheets following the format of a well-established referendum launching. The electors mostly indicate their name, identification number and their mother's maiden name on the recommendation sheet.

Some criticism was voiced with regard to the new recommendation system following practical experience. The president of the Hungarian National Authority for Data Protection and Freedom of Information considered the new system as innovative prior to the elections.[102] The Authority's head of department also expressed his opinion in a study in relation to the new recommendation system, stating that it was the dispositive rule that allowed the citizens to recommend more than one candidate, thereby eliminating the motives engendered for their misuse.[103]

During the previous elections the problems were generated by the fact that large nominating organizations – understandably from a campaign viewpoint – were unsatisfied with the limit of legally required number of recommendations slips and aimed at collecting the maximum number of slips they could get, thereby making it impossible for smaller parties to partake in the election race.[104] The implementation of multiple recommendation possibilities truly devalued the significance of this legal instrument, and according to the head of the department of the Hungarian National Authority for Data Protection and Freedom of Information, easing of this situation was to be expected in the elections, at least on the data protection side.[105]

According to a study examining the new election regulations, candidates and nominating organizations handle personal data restrictively. Besides, with the new system, the theft of notifications is likely to disappear.[106] In any event, the electors will be notified of their registration on the electoral list. Nevertheless, this said notification will not detail the two necessary items that must appear on the recommendation sheet, that is: the identification number of the person and his mother's maiden name. Therefore, mass stealing

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100 Az új magyar választási rendszer (The new Hungarian electoral system), fn. 1, p. 40.

101 *B. Révész*, Adatvédelmi kérdések a választási eljárás során (Questions about data protection in the electoral procedure), Pro Publico Bono – Magyar Közigazgatás. no. 4|2013 p. 75–76, http://uninke.hu/uploads/media_items/pro-publico-bono-magyar-kozigazgatas-2013-4-1.original.pdf.

102 See, http://www.naih.hu/files/NAIH-koezlemeny-az-ajanloszelvenyek-gy-jtesenek-tervezett-megszu enteteserol.pdf.

103 *Révész*, fn. 101, p. 77.

104 Id., p. 77.

105 Id., p. 77.

106 Az új magyar választási rendszer (The new Hungarian electoral system), fn. 1, p. 40.

of notifications and registration notices like in previous elections will be of no avail to the thief's, thereby making data management far more secure.

Even critics agreed to the fact that it was eminent for the former nominating system to be revised. However, they are of the opinion that the new system brought about more problems than solutions, since the candidates and the nominating organizations still have access to electors' personal data.[107] The possibility of multiple recommendations creates a risk according to press reports;[108] in that activists collecting signatures in different electoral districts can exchange the collected personal data they have in their possession and forge signatures on recommendation sheets, thereby making misuse of personal data easily.[109]

András Patyi, President of the National Election Commission, also confirmed in his report on the national parliamentary elections of 2014, that it was justified for the legislature to revise the multiple recommendation system by modifying certain elements of the regulations to basically give electors only one valid recommendation possibility per category.[110]

Parliament, however, seems not to plan any such amendments for the time being. Moreover, it implemented the multiple recommendation system to the local government elections of October 2014 as well. It is interesting to note that this said modification was eventually enacted into law as a result of the recommendations of a member of parliament of an opposition party.

The basic recommendations for amendment were explained as follows:

> The abolishment of the multiple recommendation system would create greater opportunities for government and larger political parties to the detriment of smaller startup opposition parties' candidates, because the party that would first hand in the recommendation sheet would be in luck. Insofar as the registration of a candidate became official and was publically known, the following signed multiple recommendations handed in would be of no avail because only the first come first serve registration would be considered valid.
> The later a political party handed in its recommendation sheets, the less chance it had of entering the race because of the possibility of a signature given earlier to another party, thereby automatically disqualifying the latter. Should one suspect this act to be voluntary, it would be specifically in the best interest of certain political activists to massively sign the opposition party's collecting sheets and thereby invalidating them.[111]

The National Election Commission requested the National Election Office to issue the following information – with regard to signature verification –, if there is culminated data available with regard to multiple recommendations. According to the National Election Office's announcement, there is no culminated data available with regard to multiple recommendations.[112] Civil societies initiated a campaign to have people personally address themselves to the election offices to inquire on which recommendation sheets they appear, in other words to verify whether their data was copied.[113] They also ensured the necessary legal representation in these instances.

Following these inquiries, the election offices asked the National Election Office for advice as to whether they were in effect obliged to give out this said information. In turn, the National Election Office asked the Hungarian National Authority for Data Protection

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107 *Pozsár*, fn. 18, p. 7.

108 http://444.hu/2014/03/08/csalas2/.

109 *László*, fn. 5, p. 7.

110 See, http://www.parlament.hu/irom40/00001/00001.pdf.

111 See, http://www.parlament.hu/irom40/00146/00146-0004.pdf.

112 http://www.origo.hu/itthon/20140309-nem-kimutathato-hanyan-ajanlottak-tobb-partot.html.

113 http://www.hirado.hu/2014/05/22/tasz-megismerhetik-a-valasztopolgarok-az-ajanloivek-adatait/.

and Freedom of Information for a decision on the matter, further stipulating that the citizens only have the right to present their request for information within the delays of appeal (i. e. until the end of the deadline of the legal remedy linked to the registration or the rejection to register a candidate). Only those recommendation sheets were accountable – from an information viewpoint – that were put through a verification procedure in a given election office.

The processing of the recommendation sheets is done via information technology, which is recorded by the different election offices who strictly verify the number signatures in keeping with standards. There were no problems with the inquiries requested by citizens from computer data based information, since the information was readily available. The technical problem occurred when the required information concerned the recommendation sheets had not been verified by the election office because the required minimum number of signatures had already been fulfilled.

The position of the Hungarian National Authority for Data Protection and Freedom of Information is as follows:

> Since the legislature warranted a relatively short period of time for the verification of the recommendations, one can assume from past experience that in a given situation when there would be a great number of recommendations to be verified, a disproportionate burden would be placed on the Electoral Committees and would make their work impossible to accomplish, and thereby would most likely endanger the elections themselves.

According to its arguments, the Hungarian National Authority for Data Protection and Freedom of Information states the following:

> The Election Committee responsible for the registration of candidates and the Election office verifying the validation of recommendations differs by nature from classical goals and functions of data management. Its unique nature derives mostly from the fact that it is temporary and specific. The personal data management aims specifically at establishing the legitimacy of the candidate, in compliance with the requirements of admissibility to run for office in the elections. The collection of the data requirements of the citizens meant that all recommendation sheets would be revised manually, item by item. Indeed, the data contained in the recommendation sheets could not be computerized since it would result in duplicated files that would thereby put the electors' personal privacy at a greater risk. […] [114]

A counter-argument rebuked the fact that the question of human resources could not come into count when freedom rights and data security protection must be a prevailing matter.[115]

One of the civil societies, however, took legal action which was received by the Budapest-Capital Regional Court of Law which ruled in favor of the civil society, ruling that the prescription for appealing personal data requests in electoral procedures did not end with the prescription date of appeal for the electoral registration of candidates, but rather the possibility to appeal was set to end with the elimination of the recommendation sheets. The provisions of the law stipulate that the recommendation sheets be destroyed on the first working day following the ninetieth day after the election. The Budapest-Capital Regional Court of Law based its judgment[116] on the grounds that since the elections were over and done with and the outcome became force of law, on account of this, the repeated verification of the recommendation sheets did not mount up to excessive and disproportionate strain on the Election Committee. As a result of this judgement, the Election Offices gave out the requested information to the citizens.

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[114] See http://www.naih.hu/files/703_2014_allasfoglalas_ajanloivek_taj_jogrol.pdf.

[115] See the article of *Majtényi László*, a former Data Protection Commissioner in Hungary: http://index.hu/belfold/2014/03/14/naih_nem_tudhatjuk_meg_hogy_melyik_partok_eltek_vissza_a_nevunkkel/.

[116] Judgment no. 35.P.21.741/2014/4.

Subsequently, however, the Hungarian Parliament amended the Electoral Procedural Law to comply with the interpretation given by the Hungarian National Authority for Data Protection and Freedom of Information. Accordingly, the Election Office is now obliged to give out the personal data information that appears on the recommendation sheet to the concerned person solely to those candidates who were subjected to verification. Furthermore, the amendment states that citizens figuring on the registration sheet could request for information only up to the time the decision to finalize the candidate was recorded in the electoral register. However the Constitutional Court of Hungary rendered the latter provision of law null and void, declaring that it unnecessarily restricted the rights of natural persons to request data and personal information on their own behalf.[117] Therefore, concerning personal data information within electoral procedures can still be requested right up to the time the recommendation sheets are destroyed.

In our point of view, however, the necessity to put limitations on information diffusion can be based on the trustworthiness of elected delegates' legitimacy. The President of the National Election Office's position is also to the effect that lawfulness must be established as soon as possible without waiting for the eightieth day following the elections. As things now stand, voters can request personal data information figuring on recommendation sheets even after the candidate's nomination has become final, thus making the legitimacy of an elected delegate questionable.

In our opinion, the solution should not be to postpone the deadline for the data information request until the ninetieth day following the elections, but rather to tie the registration of a candidate in the electoral register to the condition that, in the event that a voter requests personal data information, it would not lead to misuse of the said personal data. The ideal solution would be to verify each and every itemized signature figuring on the recommendation sheets one by one. Unfortunately, for the time being, the Election Offices do not have legal permits to proceed with the possibility of comparing signatures from two separate data bases – that of the electoral and personal data base and that of the address data registration base – as it stands now, interlinking the two data bases would be considered unconstitutional.

Election Offices could be required to immediately write to the individuals who signed recommendations sheets in order to inform them that they received recommendations from them regarding a given candidate. In the event that the person in question did not in effect recommend the given candidate, he would have a given deadline to notify the election office of the situation.

All these problems repeatedly bring up the necessity to also rethink the recommendation system. Being aware of the fact that the problem of the recommendation system is merely second-rate procedural in nature, being in essence a political issue, we encourage a radical change be undertaken to the recommendation system. First and foremost we suggest, as an example the integration of a deposit to serve as a retainer which would become an integral part of the recommendation system after its adoption by the Hungarian Electoral Law.[118] Such a system of deposit/retainer already exists in a number of Europe-

[117] According to Constitutional Court Decision 26/2014., the right to personal data is restricted unconstitutionally as the voters shall request for information about his or her personal data on the registration sheet only until the decision on the registration of the candidate or until the list becomes valid. The Constitutional Court annulled the challenged regulation as there was no acceptable reason (e. g., enforcement of other fundamental right or protection of other constitutional value) to restrict the right to access to personal data of the voters.

[118] *Á. Cserny,* A választójogi szabályozás néhány aktuális kérdése (Certain actual questions of the electoral law), Új Magyar Közigazgatás, no. 12|2010, p. 21.

an Countries.[119] In the United Kingdom, for instance, anyone who deposits 500 pounds in trust can get listed on a ballot sheet, and should the candidate win at least five percent of the votes in a given constituency, he/she is refunded his or her deposit.

In Greece, a candidate nomination costs less than 150 euros; nevertheless, this amount is not refundable. In Lithuania, where there is a mixed system, separate deposits have to be made, one to be eligible for individual candidacy, and the other to be on the party lists. The refund is tied to performance.

IV. Modifications made to the electoral regulations of local governments

Almost four months prior to the elections of October 2014, the parliament amended the regulations of the local governmental elections regarding regulations on the election of the members of the Budapest City Council. As a result of this amendment, the elected mayors of the capital's districts automatically became members of the Budapest City Council as well.

On top of 23 mayors, 9 delegates get to be elected to the Budapest City Council from the compensation list. The modifications brought about resulted in the votes given to the losing mayor's candidates going towards the compensation list, calculated on a ratio base between the numbers of citizens of the districts. In other word, elector's votes in districts with a larger voting population were multiplied by as many citizens that lived in the given district (proportionately less votes were given to lesser populated districts).

The main criticism opposing these legal amendments was that the 23 members of the municipal assembly were not directly elected by the electors themselves, even though Art. 35 para. 1 of the Fundamental Law stipulates that "local government delegates and mayors are to be elected by direct and secret ballot". The principles supporting this fact are that without individual nominations we cannot qualify assembly delegates as elected. As for being a member of the Budapest City Council there is no real need for "nominations" since this position is not more than an accessory to the administration of the elected mayor office. Therefore, theoretically, one of the principles of direct participation prevails when, as a whole, the selected candidates run for office in the capacity of the position they wish to exercise once elected. Based on this enunciation, the Budapest City Council is not an elected body since its 23 members are not elected to their individual posts. It is true though, that the districts mayors are directly elected to their office as mayors, but the elections do not incorporate the membership to the Budapest City Council. In the compensation lists, the cumulated fractional votes are not intended to the candidates of the Budapest City Council, but rather to the candidates running for district mayors.

Another point of view closer to home is the fact that we consider that direct voting means that the electors vote directly for candidates during elections, and do not vote for electors. Nevertheless, the challenged regulations are not considered to violate the principle of direct elections because, in effect, the mayors are elected directly by the electors, who will in turn automatically become members of the Budapest City Council. It cannot be concluded from the Fundamental Law that legislation – with duly supported arguments – could not work out an electoral system, entitling voters to elect a candidate to local governments for two different posts within one single voting ballot.

It is worth referring to the typical election model which is, without a doubt, direct suffrage. Nevertheless, in democratic countries there are plenty of examples of indirect

[119] Hibák a rendszerben: Audit a magyar országgyűlési választási rendszerről (Errors in the system. Audit about the Hungarian parliamentary elections), Political Capital Institute p. 26, http://www.valasztasi rendszer.hu/wp-content/uploads/PC_ValasztasiAudit_090826.pdf.

voting as well; for instance, the election of the President of the United States of America is an indirect vote as well, in which citizens cast ballots for a slate of members of the U. S. Electoral College. These electors in turn directly elect the President. We relate the fact that the Constitutional Court ruled on this decision by a majority vote, and may we add that, according to the Hungarian Local Government Election Laws of 1990, twenty two members of the municipal assembly had been elected by delegates of the capital's districts, and the members of the county delegates were elected by a delegation elected by delegate bodies of villages and townships.

Besides what was aforementioned, an objection was raised with regard to an amendment made to the provisions of the local government's electoral regulations because voters' rights were violated in that they were subjected to unequal treatment. That is to say that the votes of the electors of certain districts of the capital have a greater weight than others because of the voter count in the different districts, where one find's enormous discrepancies.

Constitutional requirements stemming from equal voting rights (i. e. the principle of equality in relation to the right to vote) were defined and applied by the Constitutional Court with regard to the capital's local government system and its specific features. Because figures show a remarkable difference in population count in the capital's different districts (some districts have six times the amount of inhabitants than others), the Constitutional Court had to regulate as a whole, the electoral legislation together with its complexities, and take a stand on whether the unequal compensation regulations built in to the legislature were compatible with equality, strictly speaking and could be considered as countervailing the said violations.

Because of the variation in population count within the capital's different districts, the violation of equal suffrage (i. e. the principle of equality in relation to the right to vote) was compensated by a ruling of legislature declaring that a bill presented to the members of the capital's general assembly can only be considered to have been voted upon by the majority if the pre-established proportion of votes was reached, and only if the mayors of those districts, in which the number of inhabitants adds up to at least half of the overall number of inhabitants residing in the capital, vote the said bill in. The main objective of this system which demands reaching majority twice is to ensure that, globally speaking, the capital's districts are represented in a ratio of true proportional of its inhabitants, in the capital's general assembly where decisions are to be made.

The Constitutional Court accepted that in order for the City Council to function effectively and produce results, the district mayors had to be integrated to the capital's general assembly, which together with the historically established boundaries of the capital's districts make the discrepancies of population count constitutionally acceptable, because of the double majority vote system, equitably offsetting the differences of population size of the different districts.

When defining the content of the constitutional requirements of equal suffrage, the Constitutional Court took into consideration the Venice Commission's report number 190/2002, in which the Code of Good Practice in Electoral Matters qualifies equal suffrage as a determining element of our common European heritage. According to the said document, equal suffrage incorporates in itself the requisites of equal distribution of seats between the different constituencies. However, geographical criterion and administrative or possibly historical boundaries may be taken into consideration.[120]

Another objection was raised with respect to the incurred legislative amendment concerning violation of equal suffrage, which is: when in the realm of the acquisition of seats from the compensation lists, votes given to the losing mayor candidate were deval-

[120] CDL-AD(2002)23 rev, 6.

uated since greater suffrage weight was granted to more populated districts. The Constitutional Court, upholding this petition, confirmed that the solutions applied to the compensation list and to the fractional votes values were mathematically therefore, constitutionally unsuitable instruments to compensate the differences generated by the differences in the number of inhabitants of the different districts.

Furthermore, this situation results in a different form of inequity from the standpoint of certain voters namely, in that the prevailing calculation system, the votes casted on the defeated candidate mayors to be, of the largest constituencies represent a six fold value, as opposed to the value calculated to the smallest ones. This section of the amendment was, therefore, stricken because it violates the principle of equal voting power.[121]

[121] Constitutional Court Decision 26/2014. (VII. 23.) AB. Regarding the requirement of equal voting power see: Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, fn. 17, p. 17.